INTERIOR BOARD OF INDIAN APPEALS

Estate of Leona Hunts Along Hale

8 IBIA 8 (02/20/1980)

Also published at 87 Interior Decisions 64

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF LEONA HUNTS ALONG HALE

IBIA 79-33 Decided February 20, 1980

Appeal from order by Administrative Law Judge Daniel S. Boos approving will and ordering distribution.

Affirmed.

1. Indian Probate: Wills: Testamentary Capacity: Witnesses' Testimony

   Where the agency clerk to whom decedent dictated her will had known the decedent and her family since the clerk was 10 years old, and the clerk's testimony established that the testatrix knew the nature and extent of her property, remembered and discussed the personal situations of each of her children, and had made a testamentary plan by which she wished to distribute her property, the fact that one of her children benefited more than any of the others did not tend to show the decedent lacked testamentary capacity, nor was the testamentary plan unreasonable.

2. Indian Probate: Wills: Testamentary Capacity: Witnesses' Testimony

   Where the witnesses to an Indian will were nurses at the hospital where decedent spent

> her last illness and testified that they had observed her conduct as a patient and her behavior with her family and felt her to be competent and able to understand what she was doing when she made a will, the reluctance of decedent's attending physician to commit himself to an opinion concerning the ability of decedent to understand "legal documents" did not tend to contradict the nurses' testimony that decedent was competent to make a will, nor did it indicate that decedent lacked testamentary capacity.

APPEARANCES: Robert W. Holte, Esq., for appellants Edward O. Hale and Timothy Hale; James P. Fitzsimmons, Esq., for appellee Sherman Hale.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On June 21, 1977, Leona Hunts Along Hale, the beneficial owner of interests in trust real property, died at Minot, North Dakota, at the age of 65. She was survived by six children, whose ages ranged from 47 to 19 at the time of her death. Her will dated June 17, 1977, was approved by the Administrative Law Judge's order on April 9, 1979. Appellant Edward Hale, her oldest son, is bequeathed $1 by the will, as is one of his sisters. Appellant Timothy Hale, together with another of appellants' sisters, is named devisee of a questioned interest in two lots and a house not included in the trust property in probate by the Department. Appellee Sherman L. Hale, the youngest son, is the principal beneficiary of the will and the named devisee of decedent's interest in 15 trust allotments, as well as all residual property not specifically described. A third daughter of decedent is

named devisee of decedent's interest in allotment No. 668A which was subject to sale at the time of the making of the will. A codicil to the will also published on June 17, 1977, which appears on the "Affidavit to Accompany Indian Will" form provided by the Department, provides for conditional bequests to five named beneficiaries of income from the possible sale of decedent's interest in allotment No. 668A.

At a series of probate hearings on April 18, September 19, and November 30, 1978, appellants sought to show decedent lacked testamentary capacity on the day she made her will. On appeal they urge the order approving will should be vacated and the will held invalid for the same reason.

Although testamentary capacity is the sole issue specified on appeal, appellants rely upon six circumstances to support their position. Thus they contend that (1) the record does not affirmatively show decedent asked for help from the agency in drafting a will, and suggests the agency assistance was procured by others acting improperly; (2) the demonstrated reluctance of the subscribing witnesses to attend the probate hearings indicates their testimony was not worthy of belief and the testimony of the attending physician should be relied upon instead to show decedent lacked testamentary capacity; (3) decedent failed to supply sufficient reasons to explain her testamentary scheme, a circumstance that indicates she did not know the extent of her property; (4) the testamentary plan is irrational and inconsistent with decedent's demonstrated affection for appellants; (5) the

appearance of the signature made on the will indicates, when compared with signatures made by decedent 10 years before, the decedent was no longer competent; and (6) the testamentary scheme itself is so unnatural as to shock the conscience and require distribution according to the statutory provisions used in cases of intestate succession. Since the first five points are primarily factual, the last contention is first addressed.

[1] The limitations imposed upon an Indian testatrix to dispose of her trust property are defined by the holding in Tooahnippah v. Hickel, 1/ which indicates that a will executed in conformity to Departmental regulations is valid, absent proof of the successful imposition of the will of another for that of the testatrix. 2/ The Secretary is without power to rewrite wills otherwise in conformity to the Departmental regulation, simply because the testamentary scheme does not conform to popular or personal notions of fitness. 3/

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1/ 397 U.S. 598 (1970). Numerous Departmental decisions have considered these same issues since 1970; for a discussion of those opinions see Estate of Joseph Caddo, 7 IBIA 286 (1979).

2/ But see the concurring opinion in Tooahnippah v. Hickel, 397 U.S. 619, where Mr. Justice Harlan opined that wills disinheriting certain persons should be carefully considered "[i]f such a will has the result of overreaching by a beneficiary, or fraud; if the will is inconsistent with the decedent's existing legal obligation of support, or in some other way clearly offends a similar public policy; or if the disinheritance can be fairly said to be the product of inadvertance * * *." The testamentary circumstances in this case are also examined against this stated standard.

3/ In Akers v. Morton, 499 F.2d 44 (9th Cir. 1974), cert. denied 423 U.S 831 (1975), the court, following Tooahnippah, affirmed the Secretary's approval of a will disinheriting a wife even though the circumstances favoring the wife's claims were most compelling.

Some of appellant's first five points do touch upon whether there was an attempt to influence decedent improperly, as well as the question of her capacity. Accordingly, both issues are considered in the following review of contentions 1 through 5.

(1) The agency clerk. Since she was about 10 years of age, the clerk assigned by the agency to prepare the will had known decedent. The clerk and decedent's daughters had played together and gone to school together. At the hospital on June 17, 1977, decedent and the clerk were alone together in decedent's room while they discussed the contents of decedent's will. Decedent dictated the will terms while explaining parenthetically the reasons for wanting to make the division of her trust property which she described. She declared that she felt an obligation to help her youngest child, and stated her belief that he needed the largest part of her trust estate. When the will was typed, it was read to decedent and witnessed by decedent's nurse and the head nurse. After the will was drafted, but before it was executed however, decedent decided she also wished to make a conditional disposition of sale proceeds from one of the allotments which was pending sale, and at her direction a codicil providing for the contingency was made and executed at the same time the will was signed. The clerk and both nurses witnessing the will agree that decedent was alert and knew what she was doing when she signed the will. Although decedent's hands were badly swollen from the progression of her disease so that she had difficulty holding the pen when

she signed, the head nurse noted that June 17 was "one of Leona's better days."

The circumstances described indicate the decedent had asked for someone to help her draw a will. Whether she had personally conveyed the request to the agency is, under the circumstances, extremely unlikely, since she was confined to her hospital bed. The record shows that she had her plan of disposition ready, discussed her property and her family situation in detail, dictated the terms of the will herself and showed generally that she was ready to make her will and wanted to do so. Nothing in the circumstances surrounding her contacts with the agency clerk suggests there was any improper influence used to procure the preparation of decedent's will.

[2] (2) The subscribing witnesses. The record shows that the two nurses from Minot were reluctant to come to New Town for the probate hearing. They did, however, attend the November 1978 session, which was concerned exclusively with their testimony. Although the parties were represented by counsel, significantly neither lawyer inquired about the reasons for the witnesses' reluctance to appear at the earlier hearing. The consistent, uncontradicted, and unimpeached testimony of both nurses is in accord that decedent was competent when she signed the will. Both witnesses give reasons for thinking that decedent knew what she did when she signed. They describe in detail

her conduct as a patient and her behavior when her family visited her. The testimony of the head nurse also shows she had known decedent previously and based her opinion that decedent was able to comprehend her acts not only upon their most recent contacts, but also upon prior acquaintance. In contrast, the testimony of the attending physician was vague concerning the ability of decedent to function during her last illness. He testified in detail concerning the symptoms of diabetes and the effect the disease had upon decedent's body. He was unwilling to express an opinion about the effect the sickness may have had upon her mind, and he said so. His testimony tends to support the nurses' testimony with details concerning decedent's specific ailments. Nothing in the circumstances of the testimony of the subscribing witnesses reflects doubt upon the capacity of decedent as a testatrix.

(3) The reasoning of the testamentary plan. Although the will does not contain a written explanation after each devise or bequest, the testimony of the agency clerk supplied exactly that. There is much more explanation given here than is usually the case. (Indeed, in the ordinary case, no such explanation is necessary.) However, perhaps since decedent and the clerk were acquainted, the drafting process included both discussion and explanation of the course of events in decedent's family (all of whom were known to both women), and a reason for each devise or bequest in relation to the personal situation of each child was supplied. Were there some showing in this

case of an attempt to influence decedent, her statement of reasons for the dispositions made by her will would rebut it. Also had there been a deterioration in decedent's mental condition, the detailed discussion and analysis by the clerk should have revealed that as well. The complete openness of the testatrix with the agency clerk throughout the entire transaction dispels any doubts that might be raised by the will's plan of distribution. Under the circumstances described, the plan appears to be neither neglectful nor unnatural.

(4) The logic of the testamentary plan. Despite the fact one son received more property from the will than both appellants combined and the record indicates all children were well regarded by their mother, it does not necessarily follow that the unequal distribution can only be explained by lack of testamentary capacity. Such a conclusion, in the absence of facts to support it, merely indicates a tendency to equate affection to a system of monetary reward. Preference may be given by a will for one child over another for reasons other than the personal preference of the testatrx. In this case the decedent stated such reasons when she dictated her will; she stated that a sense of obligation to her youngest child, together with a sense the others did not need assistance, dictated the disposition chosen. It is conceivable, but immaterial, that her personal inclinations, had she followed them instead of a sense of maternal duty, might have dictated other choices. Indeed, as the plan is explained by the testimony of the agency clerk, when the difference in the ages

and situation of decedent's children is considered, the testamentary scheme is consistent with natural family affections. Since there is no showing anywhere in the record that decedent experienced mental failure as a result of her sickness, no such failure can be presumed from the testamentary plan on the basis that the plan was inconsistent with decedent's desires.

(5) The signature. Comparison of the two handwriting samples offered does show a marked change. The difference is entirely consistent with the testimony of the attending physician and the two subscribing witnesses, and is fully explained by the swollen condition of decedent's hands. The condition of decedent's hands is completely uninstructive on the issue of testamentary capacity sought to be raised on appeal, since considering the record as a whole, there is no showing of mental deterioration corresponding to the progression of the disease which ended decedent's life.

The Administrative Law Judge correctly found decedent to be competent to make a will. The will vas properly admitted to probate pursuant to Departmental regulation. 4/

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4/ 43 CFR 4.233, implementing the Act of June 25, 1910, 36 Stat. 856, as amended (25 U.S.C. § 373 (1976)).

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order determining heirs issued April 9, 1979, is affirmed.

This decision is final for the Department

//original signed
Franklin Arness
Administrative Judge

I concur:

//original signed
Wm. Philip Horton
Chief Administrative Judge